

CONFIDENTIAL

OFFICE FOR THE PREVENTION OF HARASSMENT AND DISCRIMINATION FORMAL INVESTIGATION REPORT

Complainant: [REDACTED]
Respondent: Mr. Todd Mulzet
Date of Incident(s): On-going from 2014 through August of 2015
Investigator: Andrea LaCampagne, Complaint Resolution Officer (CRO), OPHD
Date of Report: November 11, 2015
Finding: Violation of the sexual harassment provision of the UC Policy on Sexual Harassment and Sexual Violence

I. Background and Allegations

[REDACTED] (the "Complainant") is a [REDACTED] in the [REDACTED] department. Mr. Todd Mulzet (the "Respondent") is a diving coach in the Intercollegiate Athletics department. On August 4, 2015, the Complainant brought to the attention of his supervisor, for the first time, that the Respondent had been making sexual remarks towards him for the past year and one-half. The Complainant wanted this behavior to stop.

The Complainant's supervisor documented the Complainant's issues and reported the matter to Ms. Jennifer Simon O'Neill, the Associate Director of Intercollegiate Athletics. Ms. Jennifer Simon O'Neill then forwarded the information to OPHD for further investigation.

II. Interim Remedies

A No Contact Directive was discussed with the Complainant, but due to the nature of his work, it was rejected by the Complainant as an option. The Complainant believes he can still perform the [REDACTED] work required of him at the [REDACTED], as long as the Respondent no longer made sexual comments towards him.

III. Jurisdiction

The Office for the Prevention of Harassment and Discrimination (OPHD) has campus-wide responsibility for stopping, preventing and remedying sexual harassment and sexual violence. The OPHD responds to and investigates potential violations of the UC Policy on Sexual Harassment and Sexual Violence, including, reports of sexual harassment, sexual violence, domestic violence, dating violence, stalking, and sexual assault brought forward by students, staff, and faculty.

IV. Applicable Policy

1. Sexual Harassment

The conduct at issue in this report occurred in both 2014 and 2015. The University of California Policy on Sexual Harassment and Sexual Violence was implemented in February of 2014. The policy was then revised on June 17, 2015, as the interim Sexual Harassment and Sexual Violence Policy, and continues to be in effect as of the writing of this report. Therefore, the conduct at issue here occurred over the span of two applicable policies. However, the definition of sexual harassment in both policies are the same. Sexual harassment is defined as:

“Unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment is conduct that explicitly or implicitly affects a person’s employment or education or interferes with a person’s work or educational performance or creates an environment such that a reasonable person would find the conduct intimidating, hostile or offensive.”

“Sexual harassment may include incidents between any members of the University community, including faculty, and other academic appointees, staff student employees, students, coaches, residents, interns, and non-student or non-employee participants in University programs (e.g., vendors, contractors, visitors and patients.) Sexual harassment may occur in hierarchical relationships between peers, or between individuals of the same sex or opposite sex. To determine whether the reported conduct constitutes sexual harassment, consideration shall be given to the record of the conduct as a whole and to the totality of the circumstances, including the context in which the conduct occurred.”

V. Summary of Findings

Based upon a preponderance of the evidence, the Respondent violated the sexual harassment provision of the UC Policy on Sexual Harassment and Sexual Violence. A detailed discussion of this finding is included in Section VII.

VI. The Investigation

A. Statements by Parties and Witnesses

1. Complainant’s Statement

I met with the Complainant on August 10, 2015. Since [REDACTED], the Complainant has been a [REDACTED] [REDACTED] in the [REDACTED]

department. The Complainant's job requires that he provide [REDACTED] and [REDACTED] at a variety of [REDACTED] facilities, including Spieker [REDACTED].

The Complainant reported that on August 4, 2015, he met with his supervisor [REDACTED]¹ to discuss two incidents involving the Respondent. The supervisor documented the Complainant's two issues in an email to Ms. Jennifer Simon O'Neill.

The supervisor's documentation notes that the first incident the Complainant discussed occurred on February 21, 2015. At that time, the Complainant was working in [REDACTED]. Following the swim meet the Complainant was [REDACTED] in Spieker Plaza when the Respondent announced in a loud voice to friends, "This is my boyfriend [Complainant's name.]" The second incident reported occurred on July 30, 2015. The Complainant was investigating [REDACTED]. This issue was reported to [REDACTED] by the Respondent. The Complainant was given the assignment to investigate [REDACTED]. While the Complainant was bending over to look under [REDACTED], the Respondent stated, "Oooh, that's the position I like you in." The Complainant responded, "Jesus Christ [], shut up." The Complainant reported that the Respondent's comment was said loud enough to be heard by nearby [REDACTED].

On August 10th when the Complainant and I met, he reported additional incidents between he and the Respondent. The Complainant stated that when he first started to work in the department he worked with co-worker, [REDACTED]. He noted that his coworker was a "buffer" between he and the Respondent. The Complainant's coworker left about [REDACTED], and the Complainant usually works alone. Since the Complainant's coworker has left the Respondent has an increasing amount of daily "harassing, sexual" comments to the Complainant while he is alone (although some comments are also made in front of coaches, student divers and coworkers.) The Complainant estimated that the Respondent has made sexual comments to him 3-4 times per week when [REDACTED]. The Complainant stated that he is aware that the Respondent is [REDACTED], and the Respondent is aware that the Complainant is [REDACTED]. The Complainant stated that [REDACTED], and he does not have a problem with the [REDACTED]. He simply wants the Respondent's sexual comments to stop.

The Complainant reported that the Respondent's comments are made so frequently that he tries not to pay attention, and can't recall every comment. The Complainant noted that he has told the Respondent on literally "hundreds of occasions he is [REDACTED]" and to "knock it off." The Complainant reported the following incidents and comments by the Respondent "off the top of his head:"

- After the first day the Complainant met the Respondent, the Respondent called the Complainant on his cell phone on a Friday or Saturday night at around 10:30 p.m. and asked him, "What are you wearing?" The Complainant is sure that he did not provide

¹ The Complainant's current supervisor is [REDACTED].

his personal cell phone number to the Respondent.

- In or around the beginning of August of 2015, the Respondent propositioned the Complainant for a "blow job" in front of [REDACTED]. The Respondent stated, "No." The Respondent responded, "I'll give you \$300. You don't have to blow me. I'll blow you. We can put a board up with a hole in it like a glory hole."
- On another occasion while the Complainant was bending over the [REDACTED] on his knees, the Respondent placed both of his knees on the Complainant's back, and made a comment about how he liked him in that position.
- The Complainant was checking the [REDACTED] with a coworker at Spieker [REDACTED]. It was physically awkward for the Complainant to see [REDACTED]. The Complainant's coworker joked that he could lower the Complainant down into the [REDACTED] by his legs. The Respondents added, "I would love for your legs to be over my shoulders."
- The Respondent would repeatedly ask the Complainant, "When are you coming to the dark side?" The Complainant interpreted as the Respondent asking the Complainant when was he going to [REDACTED].
- The Respondent "cat called" whistled at the Complainant when the Respondent was at his office above the [REDACTED].
- The Respondent has told the Complainant on numerous occasions, "Oh [Complainant's last name], you look good today."
- The Respondent would get [REDACTED] to call out, "Hey, [Complainant's last name]," then in a high pitched voice the Respondent would also call out to the Complainant, "Heeey, [Complainant's last name.]
- The Respondent fills out [REDACTED] to get the Complainant to [REDACTED] on the [REDACTED]. However, when the Complainant arrives to do [REDACTED], the Complainant believes that it is not [REDACTED] (the Respondent is present as well.) The Complainant believes that the Respondent [REDACTED] as an excuse to get the Complainant's attention or to get him to go to the [REDACTED] unnecessarily in order to make rude or sexual comments towards him.

2. Complainant's Witness 1 ("CW 1") Statement

The Complainant identified [REDACTED] (hereinafter, "CW 1") as a coworker who may've been present when the Respondent made sexual comments to the Complainant. On September 1, 2015, I met with CW 1, a [REDACTED] in the [REDACTED]

department. I asked CW 1 about the working relationship between the Complainant and the Respondent, and whether he's noticed any tensions between the two.

CW 1 noted that "since [REDACTED], a coworker], left in [REDACTED], [the Complainant] has been in charge" and with more responsibility and more time on the [REDACTED], the comments by the Respondent towards the Complainant have escalated. CW 1 stated that he was present when the Respondent told the Complainant, "I'd like your feet on my shoulders." CW 1 recalled that the comment was made at the [REDACTED]. CW 1 also reported that he overheard the Respondent comment to the Complainant that "when I get a big bonus check I can pay you" as if he was sexually propositioning the Complainant for money.

CW 1 recalled that he and the Complainant were inspecting the pedestal of a diving board, their "butts [were] in the air, and we were on our knees" and the Respondent said to the Complainant "Oh that's perfect, stay just like that." CW1 stated that he's overheard the Respondent ask the Complainant about "coming to the dark side." He said the comment was made on the [REDACTED] and that he "tried to tune it out and would walk away." CW 1 stated that he's overheard the Complainant tell the Respondent, "That's not cool," or "I'm not into that." CW1 reported that he's heard the Respondent "whistle" at the Complainant, and that he's seen the Respondent goad "the [REDACTED] into yelling out [the Complainant's] name" on the [REDACTED].

CW 1 stated that the Complainant's [REDACTED] and that the Complainant is "okay with everyone." CW 1 asked the Complainant if he "wanted to say something [official]," i.e., make a formal complaint, but the Complainant responded, "I just want this to stop. I don't want to get him into trouble. I've told him 'no' before."

CW 1 reported that the Complainant has told him about other sexual comments the Respondent has made to the Complainant when CW 1 was not present. CW 1 added that he was not present, but that the Complainant told him within a day or two after it occurred that the Respondent propositioned the Complainant "for a blow job while students were present." CW 1 stated that once when he returned from his vacation, the Complainant told him that the Respondent pushed his knees into his back while he was bending over, and that he finally talked to his supervisor, [REDACTED].

CW 1 noted that he knows that the Respondent's comments bother the Complainant. Male coworkers tease the Complainant at work. For example, when a [REDACTED] male coworkers will say to the Complainant, "Your boyfriend wants you."

3. Complainant's Witness 2 ("CW 2") Statement

The Complainant suggested I speak to [REDACTED] ("CW 2"), the [REDACTED], about the Respondent's behavior. CW 2 reported that he had never been a witness to any inappropriate comments or acts between the Respondent and the Complainant. CW 2 stated that there is usually very little overlap in his schedule and the Respondent's schedule at work and so he has not witnessed interactions between the

Complainant and the Respondent. CW 2 added that he was told by a [REDACTED] who was "close to both [the Respondent] and [the Complainant] that [the Respondent] had a crush on [the Complainant.]"

4. Respondent's Statement

I met with the Respondent on August 26, 2015. I reviewed the investigatory procedures for this formal investigation, and explained the definition of sexual harassment. The Respondent stated that he sees the Complainant at work [REDACTED] approximately 1-2 times per week. However, he only saw the Complainant [REDACTED] throughout June, July and the first week of August, 2015, 3-4 times.

I reviewed each of the incidents as reported by the Complainant with the Respondent. The Respondent vehemently denied that he participated in any inappropriate incidents and behaviors described by the Complainant. After I described each comment or interaction, the Respondent stated, "No, absolutely not."

The Respondent noted that he would call out, "[REDACTED] time!" once in a while when the Complainant came [REDACTED], but it was just a funny greeting, and he made it because he was happy to get help [REDACTED]. The Respondent stated that he "probably" told the Complainant, "You're looking good," or said he's a "handsome man" but that it was just a compliment, and was not meant sexually.

The Respondent reported, "[I'm] aware of comments I make in front of [REDACTED], and I'm very cautious about what I say [in front of them.]" The Respondent believed that if [REDACTED] overheard inappropriate interactions or were uncomfortable, that it would be hard to believe they would not report the matter up the chain of command.

The Respondent knew that the Complainant was [REDACTED] even though there was never an explicit conversation about it. The Respondent knew because the Complainant would "chase [REDACTED] around," a [REDACTED]. The Respondent has been in a relationship for the past three years. The Complainant confided to the Respondent that "[REDACTED]. And he thinks that his [REDACTED] friends hit on him." The Respondent wondered, if the Complainant's complaint was a form of [REDACTED] discrimination against him.

The Respondent posits that the Complainant may be bringing this complaint forward as a form of retaliation, because the Respondent complained to [REDACTED] [REDACTED], about the problems he was having getting [REDACTED] from the Complainant and [REDACTED]. The Respondent stated that he wanted more [REDACTED] from [REDACTED], and he complained to [REDACTED]. The Respondent wanted help [REDACTED], and he needed help [REDACTED]. Without help, the Respondent had to do this work himself. The Respondent was frustrated that he sent numerous emails complaining about the lack of help from [REDACTED]. He recalled that he was embarrassed about the condition of the [REDACTED] when [REDACTED] was still at UC Berkeley. [REDACTED]

[REDACTED]. The Respondent noted that he didn't want to blame the Complainant for all of the problems because [REDACTED] "has other priorities, there's a pecking order, and football and the stadium get priority." Nevertheless, the Respondent stated that he sent an email complaining to [REDACTED], and one hour later the Complainant showed up in "a hostile posture," then filed this complaint against him.

I asked the Respondent if there was any communication with the Complainant after work hours. The Respondent showed me a text message conversation where the Respondent was asking for help on the [REDACTED] and wrote, "How can I get love around here?" The Complainant answered, "Go to the Castro." The Respondent stated that the Complainant never told him that he was uncomfortable or to stop making inappropriate or sexual comments toward him, because there's "no reason for it to come up."

4. Respondent's Witness (RW 1) Statement

I spoke over the phone with [REDACTED], ("RW 1") on November 9, 2015. RW 1 confirmed that the Respondent sent email complaints that he was not getting enough assistance with the [REDACTED] of Spieker [REDACTED]. RW 1 noted that [REDACTED], was the former Lead [REDACTED], but he left about [REDACTED]. After [REDACTED] left there was no Lead [REDACTED]. The Complainant did the best that he could, but he was not a Lead [REDACTED]. [REDACTED] During the interim period when there was no Lead [REDACTED] and no [REDACTED] Supervisor, the Respondent was frustrated by the lack of support he received and the poor condition of the [REDACTED], and the [REDACTED] area.

RW 1 felt that the Respondent was advocating for more assistance from [REDACTED], but he was not specifically complaining about the job performance of either the Complainant or [REDACTED]. RW 1 did speak with the Complainant about helping the Respondent on the [REDACTED]. RW 1 stated that the Complainant "wasn't in trouble at all." RW 1 stated that the Respondent is "a fantastic coach, the [REDACTED] is under-supervised, and he gets frustrated and upset, but his [frustration and anger] was not directed at a specific person."

B. Documentary Evidence

The following documentary evidence was reviewed as part of this investigation. Relevant portions of the documentary evidence are summarized.

1. Email, dated August 4, 2015, from [REDACTED], the Complainant's supervisor to Ms. Jenny Simon-O'Neil re the issues discussed between [REDACTED] and the Complainant on August 4, 2015. This email was submitted by [REDACTED].
2. Text messages, dated from July 29, 2015 through August 4, 2015 between the Respondent and the Complainant. The Respondent asks for help from the Complainant because when the Respondent [REDACTED]

[REDACTED], and other issues. The emails are amiable. The Respondent starts the text string on July 29th by stating, "Can I get some help please?" The Complainant replies the same day, "With what?" On July 30th, the Respondent writes, "[G]ive me a call when you get a chance I Just have a quick question for you. The Complainant does not respond, and on July 31st the Respondent texts to the Complainant, "What's a guy gotta do to get some love around here." The Complainant replied, "Good question? Go to the Castro? lol I'm stuck up here at the stadium right now." The Respondent explains that the spotting rig fell down and he needs help getting it back up again. The Complainant helps with the project. These text messages were submitted by the Respondent.

3. Email messages from the Respondent to [REDACTED] on August 3, 2015, regarding getting "[REDACTED]." These email messages were submitted by the Respondent.
4. Email from the Respondent to [REDACTED] that they need to help in setting up and breaking down the [REDACTED] equipment, dated September 16, 2014. This email was submitted by the Respondent.
5. Email to [REDACTED], dated February 13, 2014, from the Respondent listing the [REDACTED] needs for the [REDACTED] area. (Some items are the same from the 2012 email below.) This email was submitted by the Respondent.
6. Email from the Respondent to [REDACTED], dated August 18, 2012, listing the [REDACTED] and [REDACTED] needs for the [REDACTED] area. This email was submitted by the Respondent.
7. Two Emails from the Respondent to [REDACTED], dated July 21, 2011, regarding upper deck trash and rodent issues. These emails were submitted by the Respondent.
8. String of emails between the Respondent and [REDACTED], dated June 28, 2011, regarding facilities and equipment needs of the [REDACTED]. These emails were submitted by the Respondent.

VII. Factual Findings and Analysis

A. Standard of Evidence: Preponderance of the Evidence

Findings in this investigation report are based on a "preponderance of the evidence" standard. In other words, after reviewing all the evidence, including the relative credibility of the parties and their statements during interviews, whether it is more likely (or probable) than not that the conduct occurred as alleged. If the conduct did occur as alleged, then an analysis is completed to determine whether the conduct violated University policy. Please note: the

report's findings do not reach conclusions whether the alleged conduct violated state or federal laws, but instead address whether the University's policies were violated.

B. Fact Finding

1. The Respondent made on-going, sexual comments towards the Complainant, and touched the Complainant, and thereby created a hostile work environment for the Complainant.

Analysis

The Complainant reported that the Respondent made on-going, sexual comments about him for at least a year and a half. The specific sexual comments are documented above in Section VI., A., 1. Most relevant is that CW 1 witnessed and corroborated many of the interactions that the Complainant experienced with the Respondent. For example, CW 1 was present when the Complainant was bent over on his knees, the Respondent said, "Oh that's perfect, stay just like that." CW 1 was present when the Respondent separately told the Complainant, "I'd like your feet on my shoulders." CW 1 overheard the Respondent tell the Complainant, "Come to the dark side." CW 1 overheard what he believed was the Respondent propositioning the Complainant for sex when the Respondent said, "...When I get a big bonus check I can pay you." CW 1 heard the Respondent cat call whistle to the Complainant. CW 1 was present when the Complainant objected to the Respondent's action by telling the Respondent, "That's not cool" or "I'm not into that." CW 1 confirmed that the sexual comments and innuendo were well known to other workers, who made fun of the Complainant and called the Respondent, his "boyfriend." Moreover, the CW 1 corroborated that close-in-time to the incidents, the Complainant reported to him that the Respondent propositioned him for a "blow job" in front of students, and that while the Complainant was bending over, the Respondent came up behind him and pushed his knees into his back.

The Respondent's behavior towards the Complainant meets the definition of sexual harassment, i.e., the Respondent's conduct was unwelcome, and of a sexual nature. Moreover, the conduct was on-going and had an effect on the Complainant. The Respondent's behavior effected the Complainant's work environment. A reasonable person would find the Respondent's behavior offensive. The Complainant came to dread working in the [REDACTED], and was worried that the Respondent was making up work for him to do, just so he could see him. Further, the Complainant had to put up with the humiliation from other co-workers, who called the Respondent "his boyfriend."

In most sexual harassment situations, there are no direct witnesses. Here, we have CW 1 who corroborates many, but not all of the Complainant's experiences with the Respondent. The sexually harassment experienced by the Complainant and witnessed by CW 1 meets the criteria for a violation of sexual harassment. According to the policy, the Complainant's allegations are analyzed by a preponderance of the evidence. The question then becomes in light of all the circumstances, is it more likely than not that the *non-witnessed* conduct occurred as reported? Here, it is more likely than not that the other conduct reported by the

Complainant occurred as he reported. The non-witnessed conduct was similar in nature to the other conduct that was witnessed CW 1. There's no motive for the Complainant to not tell the truth. And the Complainant reported some of the conduct close in time to CW 1, and CW 1's recollection of the behavior matched the Complainant's reporting of the behavior.

Finally, it is not plausible to believe that the Complainant brought forth his complaint against the Respondent as retaliation. First, the Complainant's own emails reflect that he did not complain specifically about the Complainant. The Complainant's emails reflect that the Respondent was advocating for more [REDACTED] and [REDACTED] help for the Spieker [REDACTED] after the Lead [REDACTED] left UC Berkeley. Second, RW 1 did not communicate to the Complainant that the Respondent was complaining about him, specifically. Therefore, there was no reason for the Complainant to have any animus against the Respondent, or a reason to retaliate against him. The Complainant simply got tired of the Respondent's harassing conduct as it seemed to be escalating into more severe behavior (i.e., touching his knees to his back, and propositioning him about a blow job.)

VII. Conclusion

By a preponderance of the evidence, the Respondent violated the sexual harassment provision of the UC Policy on Sexual Harassment and Sexual Violence.

Therefore, this formal investigation report is being referred to Ms. Jenny Simon-O'Neill, in the Athletics department, and to the Human Resources department for review.